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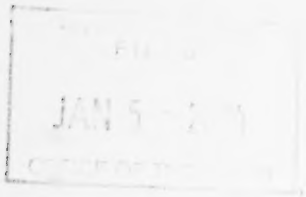

No. 03-806

In the Supreme Court of the United States

ROBERT MARIANA, MICHAEL J. MCFADDEN, KAREN M. MORAN, AND EDWARD M. NANKERVIS,
Petitioners

v.

GERALD J. PAPPERT, IN HIS OFFICIAL CAPACITY AS ACTING ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA; AND GREGORY J. FAJT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DATE: January 5, 2004

QUESTIONS PRESENTED

1. May state officials who file and settle a lawsuit be petitioning parties for purposed of *Noerr-Pennington* immunity from antitrust claims.

2. If state regulation at the manufacturer level results in higher prices that are passed on to consumers, do consumers have standing to challenge the regulation's constitutionality under the Commerce Clause and Compact Clause?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases **Page**

A.D. Bedell Wholesale Co. v. Philip Morris, Inc
263 F.3d 239 (3d Cir. 2001). 1-4

Forces Action Project, LLC v. California,
61 Fed. Appx. 72 (9th Cir. 2003) 5

Hise v. Philip Morris, Inc.,
46 F.Supp.2d 1201 (N.D. Okla. 1999), *aff'd*,
208 F.3d 226 (10th Cir. 2000) *cert. denied*,
531 U.S. 959 (2000) 5

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 4

North American Trading Co. v. Nat. Ass'n of Attorneys General,
No. 01-CV-01600 (D.D.C. 2002) 4

Parker v. Brown,
317 U.S. 341 (1943) 2

PTI, Inc. v. Philip Morris, Inc.,
100 F.Supp.2d 1179 (C.D. Cal. 2000) 5

Starr v. Scientific, Inc. v. Beales,
278 F.3d 339 (4th Cir.) *cert. denied sub nom* . . 4

Starr Scientific, Inc. v. Kilgore ____
U.S. ____, 71 U.S.L.W. 3234 (2002) 4

Trucking Unlimited California Motor Transport Co. and Trucking Unlimited,
404 U.S. 508 (1992) 3

United States Steel Corp. v. Multistate Tax Comm'n,
434 U.S. 452 (1978) 2

Virginia v. Tennessee,
148 U.S. 503 (1893) 2

Statutes

Interstate Commerce Clause,
U.S. Const., Art I, § 8, c.3 1

Pennsylvania's Compact Clause,
Art. I, § 10, c.3 1

Sherman Act,
15 U.S.C. § 1 1

STATEMENT OF THE CASE

Petitioners, four Pennsylvania cigarette smokers, brought this action to attack Pennsylvania's participation in the Master Settlement Agreement which resolved the litigation brought by 46 States, including Pennsylvania, against the major American manufacturers of cigarettes. Petitioners alleged that the Master Settlement Agreement violated the Sherman Act, 15 U.S.C. §1; and the Constitution's Interstate Commerce Clause, U.S. Const., Art. I, §8, cl. 3 and Compacts Clause, *Id.*, Art. I, §10, Cl. 3. Respondents are Pennsylvania's Acting Attorney General Gerald J. Pappert and Secretary of Revenue, Gregory S. Fajt.[1] Other parties to the Master Settlement Agreement — the major cigarette Manufacturers — had already successfully defended against similar antitrust claims. *See A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239 (3d Cir. 2001), *cert. denied*, 122 S.Ct. 813 (2002), and were not named as parties.

The respondents moved to dismiss the complaint, and the district court granted their motion. The court concluded that the antitrust claim against the respondents was barred by the *Noerr-Pennington* immunity doctrine "[b]ecause the [Master Settlement Agreement] arose out of a petition in proceedings before other governmental agencies authorized to resolve such

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[1]Mr. Pappert and Mr. Fajt have been substituted for their predecessors D. Michael Fisher and Larry Williams pursuant to Supreme Court Rule 35.3.

issues."[2] App. 48a. The district court briefly considered whether the respondents' conduct might also be protected from antitrust liability as state action under *Parker v. Brown*, 317 U.S. 341 (1943), but rejected that argument on the strength of dicta from the Court of Appeals' earlier decision in *Bedell*. App. 48a-50a. The district court did, however, reject the Commerce and Compacts Clause claims, concluding that the Master Settlement Agreement did not burden commerce, did not "encroach upon or interfere with the just supremacy of the United States," quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893), App. 58a, and was indistinguishable from similar multi-state arrangements which this Court has upheld. App. 59a, citing *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).

The Court of Appeals affirmed. Although it acknowledged that the case before it "differ[ed] from *Bedell* in that the parties are different, " App. 26a, and that the Court in that case may "have placed too little significance on the States' role in the implementation of the MSA," App. 25a, the Court of Appeals held that the State Officials were not entitled to *Parker* immunity because "it [felt] bound by *Bedell* from reaching a different conclusion." App. 26a. The Court did hold, however, that the respondents enjoyed *Noerr-Pennington* immunity. The Court observed that "Defendant Fisher was among the dozens of Attorneys General across the country who filed suit against the tobacco companies, effectively petitioning the judiciary. In *Trucking*

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[2] *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

Unlimited, [California Motor Transport Co. & Trucking Unlimited, 404 U.S. 508 (1992)], the Supreme Court made explicit that the *Noerr-Pennington* doctrine immunizes petitioning directed at any branch of government, including the executive, legislative, judicial, and administrative agencies. 404 U.S. at 510, 92 S.Ct. 609. In *Bedell* we held that the settlement that arose from the tobacco lawsuits was petitioning for *Noerr-Pennington* purposes. 263 F.3d at 252." App. 16a. The Court said that petitioners "provide[d] no persuasive authority" that petitioning immunity could not apply to a public entity, and the Court knew "of no Supreme Court or federal appellate case to this effect." App. 19a.

The Court of Appeals went on to conclude that the petitioners, as cigarette smokers, lacked standing to pursue to Constitutional claims under the Commerce and Compacts Clauses. Citing to this Court's precedents and its own, the Court of Appeals held that the petitioners failed to demonstrate either "constitutional" or "prudential" standing because they failed to allege any injury in fact, asserting only injuries suffered by cigarette manufacturers. App. 27a-32a.

REASONS FOR DENYING THE WRIT

Petitioners have offered no reason why the Court should review the case. They have pointed to no split in authority among the circuit courts of appeals or to any unsettled issue of law as to which the Court should provide guidance. They do argue in their petition that the court of appeals was wrong and misapplied the law, but the correction of error is not alone a reason for the Court to grant the petition. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of an erroneous factual findings or the misapplication of a properly stated rule of law.")

Here, both with respect to its holdings on the antitrust claim and the constitutional ones, the Court of Appeals has properly stated the rules of law: as to the former, the *Noerr-Pennington* doctrine, and as to the latter, the Court's *Lujan* case on constitutional standing.[3] There is no division of opinion on the issues among the federal courts. Similar or identical challenges to the Master Settlement Agreement have been made and rejected in the following cases, in many of which petitions for certiorari have been rejected by the Court: *See A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239 (3d Cir. 2001), *cert. denied*, 122 S.Ct. 813 (2002)[Corporate parties to the Master Settlement agreement entitled to *Noerr-Pennington* Immunity; *Starr Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir.), *cert. denied sub nom. Star Scientific, Inc. v. Kilgore*, __ U.S. ___, 71 U.S.L.W. 3234 (2002)(No violation of Commerce or Compacts Clauses); *North American Trading Co. v. Nat. Ass'n of Attorneys General*, No. 01-CV-01600 (D.D.C.

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[3] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

2002) (Parties lacked standing to assert constitutional claims); *PTI, Inc. v. Philip Morris, Inc.*, 100 F.Supp.2d 1179 (C.D. Cal. 2000)(Private and state defendants entitled to immunity from antitrust claims, and no violation of Commerce or Compacts Clauses); *Hise v. Philip Morris, Inc.*, 46 F.Supp.2d 1201 (N.D. Okla. 1999), *aff'd*, 208 F.3d 226 (10th Cir., 2000), *cert. denied*, 531 U.S. 959 (2000)(antitrust and constitutional claims dismissed); *Forces Action Project, LLC v. California*, 61 Fed. Appx. 72 (9th Cir. 2003)(affirming refusal to allow amendment to assert antitrust claims - -constitutional claims had earlier been dismissed).

There is no reason to revisit these issues in this case, and the petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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January 5, 2004